IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.187 OF 2002

IN

PARSI MATRIMONIAL SUIT NO.32 OF 1993

Sheriar F. Patel ...Appellant

v/s

Gulshan S. Patel ...Respondent

Mr P.M. Shah for Appellant.

Mr S.D. Mogre for Respondent.

CORAM : D.K. DESHMUKH AND J.H. BHATIA JJ.

DATE : 16TH OCTOBER 2007.

P.C. :-

1. By this appeal, the appellant who is original plaintiff challenges the order passed by the learned Single Judge of this Court dated 24th October 2001 in parsi matrimonial suit No.32 of 1993. The suit was filed for a decree of divorce on the ground of cruelty and desertion. Following issues were framed by the learned Single Judge.

1) Does Plaintiff prove that Defendant has deserted him without just cause since August 1990 and in any event since about April 1991 for over two years preceding the institution of this suit ?

2) Does Plaintiff prove that the Defendant has treated him with cruelty and/or in any manner or way to render it improper for him to live with the Defendant ?

3) Does Plaintiff prove that the Defendant is unfit to have the custody of the minor Ruzbe ?

4) Is Plaintiff entitled to a direction that

the child Ruzbe be kept within the jurisdiction of this Court until he attains the age of 16 years ?

5) Is Plaintiff entitled to an order that child Ruzbe may be made a ward of this Court ?

6a) Does Plaintiff prove that the list of joint matrimonial property given by him is true ?

6b) Is Plaintiff entitled to any relief in regard to joint matrimonial property ?

7) Relief and costs ?"

. So far as the issues regarding desertion and cruelty are concerned, the learned Single Judge, after setting out what is to be considered, sought the opinion of the five delegates. All the five delegates unanimously stated that the plaintiff has not succeeded in proving either cruelty or desertion against the wife. As per the law, the decision of the delegates was binding on the learned Single Judge and therefore, he has recorded a finding that the plaintiff has failed to prove desertion and cruelty. There were only two issues

to be considered by the learned Single Judge. One was regarding custody of the minor child and other was regarding joint matrimonial property. The learned Single Judge has considered both the issues and has made orders.

2. The learned counsel appearing for appellant stated that he does not want to challenge the findings on the questions of custody of the minor child or the joint matrimonial property. According to him, he is entitled to challenge the finding of the learned Single Judge that the plaintiff has failed to prove that there was cruelty on the part of the defendant as also desertion. He relies on a judgment of the Supreme Court in the case of V. Bhagat v/s Mrs D. Bhagat, reported in JT 1993(6) SC 428. Under the Parsi Marriage and Divorce Act, appeal is provided by section 46. Section 46 reads as under :-

> "46. Determination of questions of law and procedure and of fact - In suits under this Act all questions of law and procedure shall be determined by the presiding Judge, but the decision on the facts shall be the decision of the majority of the delegates before whom the case is tried;"

Provided that, where such delegates are equally divided in opinion, the decision on the facts shall be the decision of the presiding Judge."

. Perusal of the above quoted provision shows that the decision of the learned Single Judge can be only on the question of law or on any defect of the procedure followed by the learned Single Judge. Section 46 of the said Act makes the decision of the delegates on the question of fact binding on the Court. The decision given by the delegates that the plaintiff has failed to prove cruelty and desertion on the part of the defendant was binding on the learned Single Judge. Section 47 does not provide for an appeal against that decision. Thus, there is no substance in this appeal.

Appeal fails and is dismissed.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary of the Court.

. Certified copy expedited.

(D.K. DESHMUKH J.)

(J.H. BHATIA J.)